Petition

Office - Supreme Court, U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1279

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

TYRONE BROWN, et al D/B/A

THUNDERGUARDS MOTORCYCLE CLUB,

Petitioner,

v.

COUNTY COMMISSIONERS OF KENT COUNTY, MARYLAND

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

C. DANIEL SAUNDERS
Attorney for Petitioners
P.O. Box 158/106 Church Alley
Chestertown, Md. 21620
(301) 778-4510

QUESTIONS PRESENTED

1. Does a substantial governmental interest exist in prohibiting "private clubs" in residential areas where, by definition, private club use encompasses all social, educational and recreational use of even family residences and seasonal or weekend homes ?

2. Is the governmental interest in promoting the general welfare through zoning sufficiently substantial to abridge the First Amendment right of peaceful assembly by prohibiting or restricting private clubs in residential areas ?

3. Is the definition of a private club in the Kent County, Maryland Zoning Ordinance illegal (a) for vagueness; (b) since it seeks to regulate ownership and purpose; and (c) since it is so general that it requires selective enforcement ?

4. Is the Kent County Zoning Ordinance regulation of private clubs being discriminatorily enforced where the enforcement effort is not tied to a statutory definition, where other private clubs are permitted to exist without conditional use status, and enforcement is carried out on a case-by-case basis ?

5. Did the trial court properly enjoin Defendant-Petitioners against a conjectural use of their property when the activities enjoined were not complained of in Plaintiff-Respondents' Petition for Injunction and were found to have terminated four years earlier ?

TABLE OF CONTENTS

page

Questions Presented..... i

Opinions Below..... 4

Pertinent Constitutional Provisions, Statutes, Ordinances..... 5

Jurisdiction..... 6

Statement of Facts..... 8

Reasons for Granting This Writ 14

Conclusion..... 24

Appendix A

Order - Court of Appeals of Maryland..... 25

Per Curiam Opinion - Court Special Appeals of Md.... 27

Decree and Writ of Injunction - Circuit Court, Kent Co., Md..... 30

Memorandum opinion - Circuit Court, Kent Co... 33

Answer to Second Amended Petition for Injunction.. 48

Appendix B

United States Constitution
Amendment I 52
Amendment XIV..... 52
28 U.S.C. §1257(3)..... 53
Maryland Code Annotated
Article 66B §4.01(a)..... 54
Kent County Zoning Ordinance
Article 4 §5..... 55
Article 5 §2.1, 2.2..... 55
Article 10, §2.33, §1, §2.. 59
Article 12 §10..... 62
Article 14 §2.2.2 63

TABLE OF CITATIONS

Bowers v. State, 283 Md. 115, 41 ALR 3d 1597, 1409 §7(b)..... 18-20

Continental Baking Cp. v. Woodring 286 US 352,55 S. Ct. 595..... 23

Golden v. Planning Board of Ramapo 30 NY 2d 359, 285 NE 2d 291... 22

Landing v. McWilliams, 173 Md. 460. 18

Levinson v. Bonaparte, 131 Md. 635. 23

Maryland National Capital Park v. Mayor & Council, 272 Md. 550.. 18

Mayor & Council v. Poe, 224 Md. 428 22

Metromedia, Inc. v. City of San Diego, 453 US___, 101 S. Ct. 288, 49 USLW 4925 (1981)..... 15

Moore v. City of East Cleveland 431 US 494, 97 S. Ct. 1932.... 14

Pocketbook Workers v. Orlove, 158 Md. 496..... 23

Schad v. Borough of Mount Ephraim, 452 US___, 101 S. Ct. 2176, 49 USLW 4597 (1981)..... 17

Sisters of Bon Secours Hospital v. Grosse Point, 8 Mich. App. 342, 154 NW 2d 644, 27 ALR 3d 1007. 22

Smith v. Atlanta, 161 Ga. 769, 132 SE 66, 54 ALR 1001..... 14

Trachsel v. Tamarac,311 So 2d 137.. 16

Constitutional Provisions

U.S. Const., Amend I ..... passim

Statutes

Md. Code Ann., Art. 66B §4.01... 11, 22

Ordinances

Kent County, Md. Zoning Ordinance passim

Text Books

52 ALR 2d 1098..... 18

R. Anderson, American Law of Zoning 2d §16.02..... 18

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

TYRONE BROWN, et al, D/B/A
THUNDERGUARDS MOTORCYCLE CLUB,
Petitioners

v.

COUNTY COMMISSIONERS OF KENT COUNTY,MD.
Responderts

PETITION FOR WRIT OF CERTIOARI
TO THE COURT OF SPECIAL APPEALS
OF MARYLAND

TO THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES of the Supreme Court of the United States:

Tyrone Brown, David S. Harris and James L. Thompson, D/B/A Thunderguards Motorcycle Club, the Defendant-Petitioners herein, pray that a writ of certiorari issue to review

the Decree and Writ of Injunction entered in the above captioned case on November 7, 1980.

OPINIONS BELOW

The Order of the Court of Appeals of Maryland denying certiorari is printed in Appendix A hereto, infra at page 25 . The unreported per curiam opinion of the Court of Special Appeals of Maryland is printed in Appendix A hereto, at page 27 infra. The Decree and Writ of Injunction issued by the Circuit Court for Kent County, Maryland is printed at Appendix A page 30 infra.

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Because the verbatim text of the pertinent constitutional provisions, statutes and ordinances is lengthy, only their citations are listed below. The verbatim text is printed in Appendix B infra beginning at page 52

Constitutional Provisions

United States Constitution, Amendment I

United States Constitution, Amendment XIV

Statutes

Maryland Code Annotated, Article 66B §4.01(a)

Ordinances

Kent County, Maryland Zoning Ordinance:

Article 4 §5
Article 5 §2.1, 2.2
Article 10 §2.33 §1, §2
Article 12 §10
Article 14 §2.2.1

JURISDICTION

The Decree and Writ of Injunction was issued by the Circuit Court for Kent County, Maryland on November 7, 1980. A timely appeal to the Court of Special Appeals of Maryland was filed and that court affirmed the Memorandum opinion and resulting injunction of the trial court (Appendix A infra, page 27).

The Court of Appeals of Maryland denied a timely petition for certiorari on September 9, 1981 (Appendix A infra at page 25). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (Appendix B infra, page 53).

The constitutionality of the Kent County Zoning Ordinance was first raised by Defendant-Petitioners in their Answer to Second Amended Petition for Ex Parte Injunction (Appendix A, page 48).

The trial court, in its memorandum opinion which is set out in full at Appendix A at page 33 infra, construed the portion of the zoning

ordinance under attack, and found Defendant-Petitioners' position inapplicable to that section. In "Obiter Dictum", the trial court indicated, however, that a revision of the Ordinance would be advisable, since the private club definition was arguably unclear.

STATEMENT OF FACTS

On August 23, 1974, approximately 2.5 acres of land improved by a 4-room house in the Seventh Election District of Kent County, Maryland was conveyed by deed to Thunderguards Motorcycle Club and duly recorded. The subject property was zoned RR - rural residential, under the Kent County Zoning Ordinance.

On May 7, 1975 the Zoning Administrator notified the Thunderguards that by conducting a private club on the premises they were in violation of the Zoning Ordinance and would have to apply to the Kent County Board of Appeals for a conditional use. The application was filed and a hearing was held on August 9, 1976. The Board of Appeals denied a conditional use on September 7, 1976.

Subsequent to the denial of conditional use, the Deputy Zoning Administrator inspected the Thunderguards' property after that

department continued to receive complaints about motorcycle noise in the area. The only violation noted at the time of the inspection was a sign on the door of the house on Defendant-Petitioners' property bearing the name "Thunderguards". The sign was removed after the Zoning Administrator sent a letter to the Thunderguards notifying them of that violation.

On March 23, 1979, the Kent County Zoning Administrator filed a Petition for Injunctive Relief alleging violation of the Zoning Ordinance by the Defendant-Petitioners (hereafter referred to as the Thunderguards) since denial of conditional use in September of 1976. The alleged violations were not enumerated nor described in any way. Defendant-Petitioners raised a preliminary objection to the capacity of the Zoning Administrator to sue in his own right and the necessity of joining the County Commissioners as real parties in interest.

Whereupon the County Commissioners filed an amended application for an ex parte injunction against the Thunderguards alleging, as before, continued use as a private club since the date of denial of conditional use in September of 1976.

The Thunderguards, by way of interrogatories to the County Commissioners, asked specifically what activities they wanted the court to enjoin. The County Commissioners failed to answer that interrogatory, and after Defendants objected, the Circuit Court refused to compel an answer.

Testimony (most of which took the form of depositions in evidence by stipulation) revealed that since September of 1976 the Thunderguards discontinued large social gatherings on the premises and that they had in fact rented halls in other locations for social functions. The testimony established that the complaints received by the Zoning Administrator were reactions to noise on the roads leading to and

from the Defendant-Petitioners' property and observations of several vans and/or motorcycles parked on Thunderguard property on occasion.

Defendant-Petitioners argue that the Zoning Ordinance is illegally vague; that the ordinance prohibits property ownership or use for social, educational or recreational purposes without defining those purposes; it therefore regulates ownership and purpose, rather than use, contrary to the authority granted in the enabling act, at MD. CODE ANN., Art. 66B §4.01(a).

Defendant-Petitioners contend that because of its broad definition of a private club, the Zoning Ordinance invites selective enforcement, (in fact it virtually requires it) and further point out that other private clubs have not similarly been required to secure conditional use status; and, moreover, that the County Commissioners have granted liquor licenses to numerous private clubs which operate without benefit of conditional or non-conforming uses

in similarly zoned areas.

Defendant-Petitioners contend that the Plaintiff County Commissioners are attempting to regulate noise on public roads under the pretense of enforcing the County Zoning Ordinance.

The trial court's Memorandum opinion construed the zoning ordinance saying that only those social, educational or recreational uses of property which are not compatible with residential surroundings constitute the type of private clubs which require a conditional use permit. It found that the Thunderguards constituted a private club by virtue of having a definite membership and collecting dues. Finally the trial court found that the current use of the property is merely that of an absentee owner, visits by the members to the property are security checks, and that this current use of the property does not constitute a private club under the Ordinance, since no social, educational or recreational purpose

is involved.

The trial court stated that because prior to September of 1976, the property had been used as a private club, in spite of its permissible use in the intervening years, there were reasonable grounds to believe that without an injunction the Defendant-Petitioners would resume their use as a private club. Consequently a permanent injunction issued on November 7, 1980, restraining the Defendant-Petitioners from using the subject property as a private club; namely holding club meetings, hosting parties, holding activities for any group in which membership is involved or engaging in any activity not compatible with residential surroundings.

REASONS FOR GRANTING THIS WRIT

Review by this Court is desirable and in the public interest; and is necessary to secure uniformity of decisions in zoning cases where the First Amendment right to assemble is involved.

While it is a proper function of local government to zone and control land use in promoting the health, safety and welfare of the community, zoning must be exercised within constitutional limits, Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977), and does not extend to unreasonable or arbitrary intermeddling with the private ownership and use of property, Smith v. Atlanta, 161 Ga. 769, 132 S.E. 66, 54 A.L.R. 1001, cert. den. 271 U.S. 672.

The Kent County, Maryland Zoning Ordinance prohibits private clubs in residential areas without conditional use status. The Ordinance is thereby

limiting the freedom of assembly. In order to abridge a fundamental right, the County must show a substantial interest which is furthered by the restriction; it must also show that any more narrowly drawn restriction would impair achievement of that goal, Metromedia, Inc. v. City of San Diego, 453 U.S.___, 101 S. Ct.2887, 49 U.S.L.W. 4925, (1981).

There can be no legitimate governmental interest in regulating private clubs as they are defined under the Ordinance:

> Club, Private. Buildings and facilities owned or operated by a corporation, association, person or persons for a social, educational, or recreational purpose, but not primarily for profit which inures to any individual and not primarily to render a service which is customarily carried on as a business.

According to that definition, most every social, educational or recreational

property use would be a private club use and prohibited in residential areas. The prohibited use is then virtually identical to the protected use, and reveals the inherent arbitrariness of the Ordinance. A zoning ordinance is arbitrary and therefore invalid if it permits designated uses of the property in a given area while excluding uses not significantly different, Trachsel v. Tamarac, 311 So. 2d 137, Fla. App.)

As defined, private clubs do not deter or destroy the purposes of the residential zones, i.e., to promote and protect residential development, open spaces and waterfront. Therefore, the prohibited use does not conflict with the comprehensive plan, or the public welfare; nor does it present any more significant zoning-related problems than the permitted uses. The private club use is in conformity with normal activities in residential areas, and

so cannot properly be considered the subject of a "reasonable time, place and manner" restriction, Schad v. Borough of Mount Ephraim, 452 U.S.___, 101 S. Ct. 2176, 49 U.S.L.W. 4597 (1981).

The County can have no overriding interest in regulating private clubs in residential areas where private clubs are in no way conflicting with the regularly permitted uses in those areas which the County is seeking to protect with its zoning regulations. The County cannot justify such a limitation on the right to assemble without an overriding interest, Schad v. Borough of Mount Ephraim, supra.

In addition to abridging a fundamental right without sufficient governmental interest, the Kent County Zoning Ordinance is illegally vague. Its definition of a private club does not provide fair notice of the conduct prohibited and does not provide adequate guidelines for uniform

enforcement, Bowers v. State, 283 Md. 115, 41 A.L.R. 3d 1597, 1409 §7(b).

Because zoning ordinances are in derogation of the common law and operate to deprive an owner of property of a use of that property that would otherwise be lawful, they should be strictly construed in favor of the property owner. 52 A.L.R. 2d 1098, 1101; R. Anderson, American Law of Zoning 2d §16.02.

Zoning ordinances and regulations should be clear, specific, definite and certain, and they should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language, Maryland National Capitol Park v. Mayor & Council, 272 Md. 550; Landing v. McWilliams, 173 Md. 460.

To withstand a void-for-vagueness scrutiny, a statute must meet both of two basic criteria. The first criterion is the fair notice principle. The statute must afford persons of ordinary intelligence

and experience a reasonable opportunity to know what is prohibited, Bowers v. State, 283 Md. 115.

The second criterion is that the statute must provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the laws. Where a statute is so broad as to be susceptible to irrational and selective patterns of enforcement, it will be held unconstitutional under the second arm of the vagueness principle, Bowers v. State, 282 Md. 115 at 122.

Moreover, where fundamental freedoms, such as the rights to free speech and assembly are involved, the vagueness doctrine demands a greater degree of specificity than in other contexts, Bowers, supra, at 123. Furthermore, where First Amendment values are at least potentially involved, the

statute is to be tested for vagueness on its face, and a defendant is permitted to challenge validity of the statute as applied to marginal cases, and is not limited to the particular factual situation at hand, Bowers, supra.

Even without applying the test for facial specificity, the statute in this case fails both the fair notice test and the adequate guidelines test. The fair notice test cannot be met if the meaning of the statute's language cannot be fairly ascertained by reference to judicial determination, the common law, dictionaries, treatises, or even the words themselves, Bowers, supra.

In this case, the meaning of the language "social, educational, or recreational purposes" cannot be determined by resort to any of these sources. Secondly, the statute fails the adequate guidelines test in that the vagueness of the language

"social, educational, or recreational purposes" invites selective or discriminatory application by persons seeking to enforce the regulation. Since the statute permits enforcement authorities to react to nothing more than their own subjective ideas of what constitutes social, educational or recreational purposes, there are no fixed standards or adequate guidelines for enforcement authorities to follow.

The Ordinance further seeks to regulate ownership and purpose by defining private club in those terms.

Clearly an ordinance which prohibits anyone without a conditional use from owning buildings for a social or recreational purpose seeks to proscribe certain forms of ownership and purpose.

Additionally, that portion of the ordinance which proscribes use (operation) by anyone of buildings and facilties for

a social or recreational purpose is so all-encompassing as to virtually proscribe any use of the property whatsoever without a conditional use approval.

The County has only the authority delegated to it by the legislature, Golden v. Planning Board of Ramapo, 30 NY 2d 359, 285 NE 2d 291. In the grant of powers from the State of Maryland to the county subdivisions, at Maryland Code Ann. Article 66B §4.01 (a), which is set out in Appendix B infra, land use is enumerated as one of the things which a county can regulate with a zoning ordinance. Ownership and purpose are not enumerated; they are inappropriate concerns of zoning regulations, Mayor & City Council v. Poe, 224 Md. 428; Sisters of Bon Secours Hosp. v. Grosse Point, 8 Mich. App. 342, 154 NW 2d 644, 27 ALR 3d 1007, 64 ALR 3d 1087 , 1095 §4.

By providing a vague definition of private club, the Ordinance forces

government officials to apply criteria other than use, subjective criteria, to determine the targets of enforcement efforts; in effect, the Ordinance requires selective enforcement.

Finally, the trial court issued an injunction against a conjectural use of Defendant-Petitioners' property even though the activities enjoined were not complained of in Plaintiff-Respondents' Petition for Injunction and were activities which the trial court in its Memorandum Opinion (Appendix A 33) found to have been discontinued four years earlier. Such a finding precluded the issuance of an injunction, Pocketbook Workers v. Orlove, 158 Md. 496; Levinson v. Bonaparte, 131 Md. 635; Continental Baking Co. v. Woodring, 286 U.S. 352, 55 S. Ct. 595, 81 ALR 1402.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

C. Daniel Saunders
Attorney for Defendant-Petitioners
P.O. Box 158/106 Church Alley
Chestertown, Maryland 21620
(301) 778-4520

Counsel of Record.

November 30, 1981.

APPENDIX A

TYRONE BROWN, et al	)	In the
	)	
	)	Court of Appeals
	)	
	)	of Maryland
v.	)	
	)	
	)	Petition Docket
	)	No. 321
	)	
COUNTY COMMISSIONERS OF KENT COUNTY, MARYLAND	)	September Term, 1981
	)	
	)	(No. 1507, September Term, 1980 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Judge Smith did not participate in the consideration of this petition.

/s/ Robert C. Murphy
Chief Judge

Date: September 9th, 1981.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1507

September Term, 1980

TYRONE BROWN, et al d/b/a

THUNDERGUARDS MOTORCYCLE CLUB

V.

COUNTY COMMISSIONERS

OF KENT COUNTY, MARYLAND

Gilbert, C.J.
Thompson
Melvin,

J.J.

PER CURIAM

Filed: June 15, 1981

Tyrone Brown, et al, the appellants, complain because Judge George B. Rasin, Jr., sitting in the Circuit Court for Kent County, enjoined them from using their property, located in the Seventh Election District of Kent County, as a private club. They raise here the following contentions:

"1. The trial court improperly enjoined defendant-appellants against a conjectural use of their property where the activities enjoined were not complained of in plaintiff-appellee' petition for injunction and were found to have terminated four years earlier.

2. The definition of a private club in the Kent County Zoning Ordinance is illegal (a) for vagueness; (b) it seeks to regulate ownership and purpose; (c) it is so general that it requires selective enforcement.

3. The Kent County Zoning Ordinance regulation of private clubs is being discriminatorily enforced where the enforcement effort is not tied to a

> statutory definition, where other private clubs are permitted to exist without conditional use permits, and enforcement is carried out on a case-by-case basis."

Insofar as these questions were presented to the trial court, they were quite adequately answered in Judge Rasin's opinion, a copy of which is attached hereto. Insofar as the issues were not presented to the trial court, we decline to rule upon them under Md. Rule 1085.

DECREE AFFIRMED
APPELLANTS TO PAY THE COSTS.

THE COUNTY COMMISSIONERS OF KENT COUNTY, MARYLAND		IN THE CIRCUIT COURT
	*	FOR KENT COUNTY,
v.	*	MARYLAND
TYRONE BROWN, et al	*	EQUITY NO. 6832

DECREE AND WRIT OF INJUNCTION

The above-entitled matter having come on or hearing on the complaint of the County Commissioners of Kent County for a permanent injunction, and on the answer of the Respondents; the parties having appeared in Court, together with their respective attornies; evidence having been adduced; counsel having been heard and the Court having filed a Memorandum in which it found that the Respondents are not currently in violation of the Kent County Zoning Ordinance but that they should be enjoined from resuming any activities of a private club,

Now, Therefore, in accordance with said Memorandum, it is hereby ORDERED, ADJUDGED and DECREED, by the Circuit Court for Kent County, sitting in Equity, that Tyrone Brown, David S. Harris, and James L. Thompson, doing business as "Thunderguards Motorcycle Club" and all of those persons claiming membership therein and the same are hereby forever restrained and enjoined from using the premises located in the Seventh Election District of Kent County, Maryland, titled in the name of "Thunderguards Motorcycle Club of Maryland" transferred to them by deed dated August 21, 1974 and recorded among the Land Records of Kent County, Maryland in Liber E.H.P. 59, folio 467, which premises consist of approximately 2.5 acres improved by a two story dwelling, from using

the said property as a private club; namely holding club meetings, hosting parties, holding activities for any group in which a membership is involved or engaging in any activity not compatible with residential surroundings.

...and it is further,

ORDERED that the costs of these proceedings, as taxed by the Clerk of the Court, be divided between the parties.

/s/ George B. Rasin, Jr.
Judge

November 7, 1980

THE COUNTY COMMISSIONERS OF KENT COUNTY	*	IN THE CIRCUIT COURT FOR KENT COUNTY
vs.	*	
TYRONE BROWN, DAVID S. HARRIS AND JAMES L. THOMPSON, D/B/A THUNDERGUARDS MOTORCYCLE CLUB	*	EQUITY No. 6832

MEMORANDUM

The Thunderguards Motorcycle Club of Chestertown, Maryland, an unincorporated association of young men sharing an interest in motorcycles, purchased a tract of real estate in 1974. The property, a 2 1/2 acre parcel improved by a two-story dwelling, is located in Quaker Neck, Kent County, Maryland. Title to the property was transferred on August 23, 1974, to the "Thunderguards Motorcycle Club of Chestertown, Maryland".

The Thunderguards proceeded to use the property for club meetings and as a site for a yearly party. In 1975 the

County Commissioners notified the Thunderguards that such use was contrary to the provisions of the Kent County Zoning Ordinance. The Thunderguards responded by applying for a conditional use permit to use the property as a private club with the dwelling to be used as a clubhouse. The application was signed by David S. Harris, James L. Thompson and Tyrone J. Brown. This application was denied by the Board of Appeals on September 7, 1976.

Following that action by the Board of Appeals the Thunderguards did curtail much of their activity on the premises. Complaints continued to be received from the neighbors, however, as to the level of noise generated by the motorcycles going to and from the property. As a result the county continuously cautioned the Thunderguards against

using the site as a private club.

On March 23, 1979, the zoning administrator filed a petition in equity against "Tyrone Brown, David S. Harris and James L. Thompson, D/B/A Thunderguards Motorcycle Club" seeking an injunction to prevent the use of the property as a private club. The Thunderguards responded by denying that they were using the premises as a private club and also by attacking certain provisions of the zoning ordinance on constitutional grounds. A hearing was held on the merits of the case on July 24, 1980.

INTERPRETATION OF THE ORDINANCE

The first task for the court is to construe the various sections of the Kent County Zoning Ordinance which are applicable to this set of facts.

The property in question is zoned "RR". This zoning has been in effect since prior to August 1974 when the property was purchased. Article 5, Section 2.1 of the ordinance states that the purpose of "RR" zoning is "to provide for low-density, single-family residential development, together with such churches, recreational facilities and accessory uses as may be necessary or are normally compatible with residential surroundings...".

The list of permitted uses in an "RR" zone includes "(r)ecreational uses such as tennis courts, swimming pools, and other similar activities operated exclusively for the use of private membership and not for commercial purposes...". It seems, therefore, that in an "RR" district the use of tennis courts, swimming pools and other similar activities is not limited to

the property owners on whose property the facilities are located. The use of the word "membership", in fact, indicates that a society or some other collective body may be afforded the use of such facilities. See 57 C.J.S. MEMBERSHIP.

A fair reading of the statement of purpose of the "RR" district along with the list of permitted uses indicates that certain types of recreational clubs would be permitted in an "RR" district. These include swim clubs, tennis clubs and other "similar activities" which are "normally compatible with residential surroundings". In all cases, however, the use of club facilities must be limited to the membership.

This interpretation is subject to the provisions of Article 10, Section 2 of the zoning ordinance. That section provides authority for the Board of Appeals to

grant a conditional use for the operation of a private club in an "RR" district. This implies that private clubs would not otherwise be permitted in such a zone.

"Private Club" is defined in Article 14, Section 2(21) as "(b)uildings and facilities owned or operated by a corporation, association, person or persons for a social, educational, or recreational purpose, but not primarily for profit which inures to any individual and not primarily to render a service which is customarily carried on as a business". The defendants contend that this definition is overly broad. It is argued that under this definition any recreational or social use of the property, such as backyard parties, neighborhood ballgames, etc., would be precluded.

The court must consider all the

parts of a statute together to ascertain the intention of the legislative body as to any one part. Wherever possible each section should be given a construction which would not conflict with the others. Bickel v. Nice, 173 Md. 1, 192 A 777 (1937). With these principles in mind the court must interpret the definition of "private club" as it is affected by the stated purpose of "RR" districts. As a result the court finds that only those social, educational or recreational uses of property which are not compatible with residential surroundings constitute the type of private clubs which require a conditional use permit. Certain clubs and facilities, the use of which is limited to the membership, are specifically permitted without a conditional use designation.

These findings are in accordance with the ruling of the court in

Howlett v. Lakeside Country Club, 198 So. 2d, 402 (as cited in 52 ALR 2d 1098, Section 4, LATER CASE SERVICE). In that case an ordinance permitted community centers and private recreational uses such as tennis courts, swimming pools and golf courses. "Clubs", however, were prohibited. The Louisiana court ruled that the actual nature of the planned operations of a country club was the controlling factor in determining the legality of its location. The "semantic coincidence" of the activities being labeled as a club was held to be of little importance.

APPLICATION OF THE ORDINANCE

The court having construed the terms of the zoning ordinance must now determine how it applies to the facts of this case. For this purpose the court makes the following findings of fact.

This court finds that the Thunderguards Motorcycle Club is a national organization. The Thunderguards Motorcycle Club of Chestertown, Maryland is an entity composed of people in the Chestertown area. There is no direct affiliation between the two. In this case only the local group is involved.

The Thunderguards Motorcycle Club of Chestertown, Maryland is the owner of the property involved in this case. The club has a definite membership and elected officers and it collects dues. The current membership totals approximately fifteen young men. The club is clearly an association as that term is used in the definition of "private club" in Article 14, Section 2(21) of the zoning ordinance.

This court also finds that prior to September 1976 the Thunderguards

used their property for club meetings and for parties at which nonmembers were present. Since September 1976 the only use of the property has been for small gatherings on an irregular basis. The county, based on information furnished by neighbors, contends that these gatherings are held on the first Sunday of each month and are in the nature of club meetings. The Thunderguards, on the other hand, aver that the only visits to the property consist of security checks made by several of the members on an infrequent basis.

The evidence at trial showed that no large parties have been held at the site for at least four years. The dwelling, which is not occupied, is used for the storage of trophies. The court therefore finds that the current use of the property by the

Thunderguards is merely that of an absentee owner. The visits by club members are, as described by the defendants, security checks. This use of the property does not constitute a private club under the ordinance despite the "semantic coincidence" of the name of the owners. No social, educational or recreational purpose is involved. The periodic checks of the premises are certainly compatible with a residential surrounding. For these reasons no injunction will be issued to prevent the use of the property as that use has been described by the Thunderguards.

Even though no injunction will be issued to enjoin the current use of the property, that holding is not dispositive of the case. "In a proper case, as where there is a reasonable ground to believe, or

there is a liklihood, that there will be a resumption of (previously terminated illegal activities) activities, a court of equitable jurisdiction may issue an injunction, since otherwise defendants would be free to return to their old ways." 43 C.J.S. INJUNCTIONS, Section 25. The court finds that prior to September 1976 the property was used as a private club. The holding of club meetings and the hosting of large parties constitutes a use for a social purpose. Furthermore, this type of activity is not compatible with residential surroundings. The parties were attended by a large number of nonmembers, many of whom were representatives of other "Thunderguards" associations. At no time was anyone living in the dwelling house on the property.

This use of the property was halted only when the county so instructed the Thunderguards. Since September 1976 the club has held its annual party in a rented hall in Delaware. The Court finds that there are reasonable grounds to believe that without an injunction the Thunderguards would resume their activities as conducted prior to September 1976.

An injunction will therefore be issued to enjoin Tyrone Brown, David S. Harris, and James L. Thompson, D/B/A Thunderguards Motorcycle Club and all those persons claiming membership therein from using the property as a private club. The parties are specifically instructed to conduct no meetings, parties or other social gatherings on the property.

OBITER DICTUM

Although the ordinance when read as a whole is clear it would be advisable for the county to revise its definition of "private club". The court feels that the concept of "membership" should be included in the definition. An example would be: "buildings and facilities owned or operated by a corporation, association, person or persons for a social, educational, or recreational purpose to which membership is required for participation and not operated primarily for profit nor to render a service which is customarily carried on as a business." Jefferson County, Kentucky Zoning District Regulations, Section2 (1973) as quoted in Anderson, American Law of Zoning, Section 16.11, Volume 3, page 39.

It is interesting to note that the Kent County ordinance does not include the words "to which membership is required for participation", a part of the suggested language in a zoning ordinance quoted above. Without the "membership" qualification one can argue that the definition of "private club" is unclear.

Counsel for the County Commissioners of Kent County is requested to prepare the appropriate decree, have it approved as to form by counsel for the defendants and present it to the court.

/s/ George B. Rasin, Jr.
Judge

Copies to:
Counsel of record

THE COUNTY COMMISSIONERS OF KENT COUNTY, MARYLAND	*	IN THE CIRCUIT COURT FOR
Plaintiffs		KENT COUNTY,
v.	*	MARYLAND
TYRONE BROWN, et al		
Defendants	*	EQUITY. 6832

ANSWER TO SECOND AMENDED APPLICATION FOR EX PARTE INJUNCTION

COME NOW Tyrone Brown, David S. Harris and James L. Thompson, Defendants, by C. Daniel Saunders, their attorney in answer to the Second Amended Application for Ex Parte injunction filed herein, saying:

1. They neither admit nor deny the allegations contained in paragraph 1 of the Second Amended Application for Ex Parte Injunction, but they demand strict proof thereof.

2. They admit the allegations contained in paragraph 2 of the Second Amended Application for Ex Parte

Injunction.

3. They deny the allegations contained in paragraph 3 of the Amended Application for Ex Parte Injunction.

4. They admit the allegations contained in paragraph 4 of the Second Amended Application for Ex Parte Injunction.

5. They admit the allegations contained in paragraph 5 of the Second Amended Application for Ex Parte Injunction.

6. They deny the allegations contained in paragraph 6 of the Second Amended Application for Ex Parte Injunction.

7. They deny the allegations contained in paragraph 7 of the Second Amended Application for Ex Parte Injunction.

8. The Defendants further aver

that the provisions of the Kent County Zoning Ordinance governing the use of private property as private clubs are unconstitutionally vague, unconstitutionally impinge upon the defendants' freedom of assembly, speech, and expression; and that the aforesaid provisions of the Kent County Zoning Ordinance are unconstitutionally enforced in a discriminatory, arbitrary and selective manner.

9. The County Ordinances which tend to proscribe private use of private property constitute a taking of property by a governmental agency without due process of law or compensation.

10. The Plaintiffs are barred from obtaining equitable relief of this Court by unclean hands and laches.

WHEREFORE, having fully answered Plaintiffs' Second Amended Application for Ex Parte Injunction, the Defendants pray that it be dismissed.

/s/ C. Daniel Saunders
C. Daniel Saunders
Attorney for Defendants
P.O. Box 158
Chestertown, Maryland
21620
(301) 778-4510

I HEREBY CERTIFY that on this 28 day of December, 1979, a copy of the aforegoing Answer was mailed to Richard R. Cooper, Esq., Attorney for Plaintiffs, Court Street, Chestertown, Md. 21620.

/s/ C. Daniel Saunders
C. Daniel Saunders

APPENDIX B

Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.

APPENDIX B

28 U.S.C. §1257. State Courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions held or authority exercised under the United States.

APPENDIX B

ANNOTATED CODE OF MARYLAND

Article 66B, Section 4.01 (a)

§4.01. Grant of powers; certain manufacturing and processing in St. Mary's County

(a) For the purpose of promoting health, safety, morals, or the general welfare of the community the legislative body of counties and municipal corporations are hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, off-street parking, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, signs, structures and land for trade, industry, residence or other purposes.

APPENDIX B

KENT COUNTY ZONING ORDINANCE

Article 4. General Provisions

Section 5. Uses Not Permitted Are Prohibited.

For the purpose of this Ordinance, permitted uses are listed for the various districts. Unless the contrary is clear from the context of the lists or other regulations of this Ordinance, uses not specifically listed are prohibited.

Article 5.

Section 2. RR, R-1, and R-2, Single-Family Residential Districts.

2.1 Purpose of the Districts.

RR Rural Residential District:

The purpose of this district is to provide for low-density single-family residential development, together with such churches, recreational facilities and accessory uses as may be necessary or are normally compatible with residential

surroundings, and at the same time, to permit agricultural uses and preserve open spaces and waterfront areas. The district is located to protect existing development of this character and contains vacant land considered appropriate for such development in the future but for which only limited public services are avail ıe or planned.

R-1 Single-Family Residential District:

The purpose of this district is to provide for medium-density residential development in areas which are, or which are expected to become, generally urban in character but where sanitary sewers and public water supplies may or may not be available at time of construction, together with such churches, recreational facilities, and accessory uses as may be necessary or are normally compatible with residential surroundings. The district is located to protect existing development of this character and contains vacant land

considered appropriate for such development in the future.

R-2 Single-Family Residential District:

The purpose of this district is to provides for single-family residential development on smaller lots, where sanitary sewers and public water supplies are available or will be available at time of construction, together with such churches, recreational facilities, and accessory uses as may be necessary or are normally compatible with residential surroundings. The district is located to include existing development of this character and contains vacant land considered appropriate for such development in the future.

2.2 Permitted Uses.

A building on land shall be used only for the following purposes:

1. Detached single-family dwellings.

2. Farms, truck gardens, orchards, and nurseries for growing or propagation of plants, trees, or shrubs, including temporary stands for six months a year only for seasonal sale of products, but not including the raising for sale of birds, bees, rabbits, or other animals, fish, or other creatures, provided that such uses are not objectionable to surrounding residences by reason of odor, dust, noise, or other factors, and provided that no retail or wholesale business office or store is permanently maintained on the premises.

3. Churches, rectories, parish houses, convents and monasteries, temples and synagogues, provided that churches, temples or synagogues erected after the date of passage of this Ordinance shall have

their principal means of access from a major street and shall be located on a lot of at least two acres in area.

ARTICLE 10. CONDITIONAL USES

Section 1. Purpose.

The purpose of this Article is to provide for certain uses which cannot be well adjusted to their environment in particular locations with full protection offered to surrounding properties by rigid application of the district regulations. These uses are termed conditional uses, which because of their unique characteristics, cannot be distinctly as permitted in a particular district without consideration, in each case, of the impact of such uses upon neighboring uses and the surrounding area and of the public need for the particular use at the particular location. Limitations and standards are established herein consistent with the character of the district and the uses and activities in the district.

Section 2. Conditional Uses Enumerated and Standards Therefor.

The Board of Appeals in accordance with the procedures and standards of this Ordinance, may authorize the following buildings, structures. and uses as conditional uses in the specific instances and particular districts set forth, provided that the location is appropriate and not in conflict with the Comprehensive Plan, that the public health, safety, morals, and general welfare will not be adversely affected, that adequate off-street parking facilities will be provided, and that necessary safeguards will be provided for the protection of surrounding property, persons, and neighborhood values, and further provided that the additional standards of this Article are complied. Unless otherwise specified in this Article or specified as a condition of approval, the height limits, yard spaces, lot area, and sign requirements shall be the same as for other uses in the district in which the conditional use is located.

No conditional use shall be authorized unless the Board finds in each specific case that the establishment, maintenance, or operation of the conditional use from

the evidence produced at the public hearing meets the standards set forth in this Article. The applicant for a conditional use shall have the burden of proof, which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Board.

As a further guide to the Board's decision upon the facts of each case, they shall give consideration to the following where appropriate:

1. The nature of the proposed site, including its size and shape and the proposed size, shape and arrangement of structures;

2. Traffic conditions including the resulting traffic patterns;

3. The nature of the surrounding area and the extent to which the proposed use might impair its present and future development;

4. The proximity of dwellings, churches, schools, public structures, and other places of public gathering;

5. The probable effect of the proposed use upon the peaceful enjoyment of the people in their homes.

33. Private clubs, in a R, R-1, R-2. R-3, or M District.

ARTICLE 12

Section 10. Certification of Nonconforming Status.

All nonconforming uses in existence as of November 18, 1969 shall apply for a certificate of conconforming status within 12 months from the effective date of this Ordinance and receive such certificate from the Administrator. Failure to comply with this requirement shall mean that at the end of the 12 month period, any claim to conconforming status shall be invalid. However, no provision of this section shall apply to non-conforming uses that have become conforming uses with the readoption of this Ordinance.

APPENDIX B

ARTICLE 14, SECTION 2

21. Club, Private. Buildings and facilities owned or operated by a corporation, association, person or persons for a social, educational or recreational purpose, but not primarily to render a service which is customarily carried on as a business.

Opposition

81-1279

Office - Supreme Court, U.S.
FILED
FEB 5 1982
ALEXANDER L. STEVAS
CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

TYRONE BROWN, et al D/B/A

THUNDERGUARDS MOTORCYCLE, CLUB,

Petitioner,

vs.

THE COUNTY COMMISSIONERS OF

KENT COUNTY, MARYLAND

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT CERTIORARI

To The Court of Special Appeals of Maryland

RICHARD R. COOPER,
Attorney for Respondent
103 Court Street
Chestertown, Md. 21620
(301) 778-5080

QUESTIONS PRESENTED

1. Does a substantial governmental interest exist to provide that "private clubs" are a conditional use in residential areas?

2. Does this provision abridge the First Amendment?

3. Is the definition of a private club in the Kent County, Maryland Zoning Ordinance illegal (a) for vagueness; (b) since it seeks to regulate ownership and purpose; and (c) since it is so general that it requires selective enforcement?

4. Is the Kent County Zoning Ordinance regulation of private clubs being discriminatorily enforced?

5. Did the trial court properly enjoin Defendant-Petitioners against a conjectural use of their property?

6. Does the action of the State Court constitute a decision of a Federal question of such substance that it merits the granting of a writ of certiorari?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Argument Against Granting the Writ 1

Conclusion 11

Appendix 13

TABLE OF AUTHORITIES

Continental Baking Company v. Woodring, 286 US 352, 55 S Ct 595

Euclid v. Ambler Realty, 272 US 365, 71 L Ed 303, 475 S Ct 114

Kotrich v. DuPage, 19 Ill 2nd 181, 166 NE 2nd 601, 81 S Ct. 243, 364 US 475

Levinson v. Bonaparte, 131 Md. 635

Metromedia, Inc. v. City of San Diego, 453 US , 101 S Ct. 2887, 49 USLW 4925

Pocketbook Workers v. Orlove, 158 Md. 496

Rice v. Sioux City Memorial Parks Cemetery, 349 US 70, 99 L Ed 897, 75 S Ct 614

Warth v. Seldin, 422 US 490, 45 L ed 2nd 343, 95 S Ct 2197

ORDINANCES

Section 2.1; Article 5 Kent County, Maryland Zoning Ordinance

RULES

Rule 17 Supreme Court Rules

TEXT BOOKS

23 C.J.S. Injunctions, section 25

ARGUMENT AGAINST GRANTING THE WRIT

The provision of the Kent County Zoning Ordinance providing that private clubs are conditional uses within RR Districts (rural-residential) is a proper function of local government within constitutional limits.

In the landmark of Euclid v. Amber Realty (1926) 272 US 365, 71 L Ed 303, 475 S. Ct. 114. This court upheld local governments right to restrict the use of land as a proper use of the police power for the public welfare. The Euclid comprehensive zoning plan approved by this court brought about the term "Euclidean Zoning" to describe similar zoning plans developed to reach the constitutional requirement provided by the Court in the Euclid case. The Kent County Zoning Ordinance in question is a Euclidean zoning ordinance.

In Euclid, supra, the Court held that a zoning regulation will be upheld as constitutional unless it is clearly arbitrary and unreasonable or it has no substantial relationship to the public health, safety, morals or general welfare. The purposes of an RR District are defined by

Section 2.1 of Article 5 of the Kent County Zoning Ordinance which states:

> "To provide for low density family residential development, together with churches, recreational facilities and accessory uses as may be necessary or are normally compatible with residential surroundings".

It is obvious that regulation or restriction of activity in a low density residential area, which would adversely effect the welfare of the area, is neither arbitrary or unreasonable and it relates to the general welfare. Activities of certain private clubs, such as motorcycle clubs with their attendant high noise volume, are inappropriate in such areas and may constitutional be regulated or restricted.

There is a substantial governmental interest to provided for such regulation. In Kotrich v. Du Page, (1960) 19 Ill. 2d, 181, 166 NE 2d 601, 81 S. Ct. 243 264 US 475, the Court upheld a provision in a zoning ordinance subjecting country clubs to special use permits in a single family zone. The Supreme Court refused to review the decision. The Court found that even this use, much less obnoxious than a motorcycle club, could be restricted in such a zone.

This Court has been reluctant to strike down zoning

laws and as noted in Warth v. Seldin (1975) 422 US 490, 45 L ED 2d 343, 95 S. Ct. 2197, such laws are peculiarly within the province of the State and local legislative authority. It is suggested that the opponents to such laws avail themselves of the democratic process rather than judicial review.

The Petitioners make some allusion to the conditional use provision being a violation of the First Amendment right to assemble. They quote Metromedia, Inc. v. City of San Diego, 453 US , 101 S. Ct. 2887, 49 USLW 4925 (1981), a case dealing with freedom of speech (billboards). Freedom of assembly decisions have all concerned assemblage for political, labor union, etc. purposes such as Thomas v. Collins, 655 S. Ct. 315, 323 US 516, 89 LED 43, where the Court said a peaceful assembly for lawful discussions cannot be prohibited. The restriction on the Petitioners is not against lawful discussion but against use as a motorcycle club with its attendant loud noise.

Petitioners contend that the ordinance is illegally vague and therefore there is a lack of fair notice of the conduct prohibited. A second void-forvagueness argument is made that it does not provide legally fixed standards and

adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the law.

This conditional use requirement for private clubs in RR Districts must be viewed in connection with the character and purpose of an RR District as set forth in Section 2.1 of Article 5 of the Kent County Zoning Ordinance.

It is obvious that the purpose of an RR District is for low density single family residential use together with uses which are compatible with such a purpose. In fact the zoning ordinance itself allows certain permitted uses for certain clubs such as tennis courts, swimming pools, and other similar activities. The statute recognizes that these activities are compatible with an RR District.

The use of land within a RR District is for single family residential purposes with compatible uses which includes such clubs as swimming clubs and tennis courts. Private clubs which use the land in a manner which is not recognized as a permitted use under the RR District provision must obtain conditional use authorization. The

statute is definately not vague as not giving fair notice nor does it fail to provide legal standards and guidelines for police, etc. The principle purpose of an RR District is for single family dwellings any group activity which is not considered by the statute as compatible with this principle purpose requires a conditional use. Obviously a private club using the land for the purposes of a motorcycle activity would have no difficulty in ascertaining that it fell within the definition of a private club which is not per se compatible with single family dwellings and therefore would require a conditional use. The club members and law enforcement officials, etc. would have no problem in ascertaining that a conditional use was required.

Petitioners further contend that the zoning ordinance is illegal since it governs the ownership of property rather than the use thereof. This is neither the language nor the purpose of the statute since the statute states that a conditional use is required for "a social, educational or recreational PURPOSE." Thus it is a private club use of the land for one of these purposes that is regulated. The club could very well purchase the land and allow one of its

members to use it for a single family dwelling and if they do not use it for other purposes their ownership of the land would not require a conditional use. Therefore it is the use of the land rather than the ownership which is regulated by the statute.

The Petitioners argument alleging discriminatory enforcement is based entirely on the contention that since the definition of private club in the ordinance is vague it requires selective enforcement and selective enforcement is per se discriminatory enforcement. Since this definition read with the purpose clause in Section 2.1 is not vague but clear as to the intent it should not be selectively enforced and therefore there is no discriminatory enforcement.

The Petitioners contend that since the trail court found that the illegal activity on the land has discontinued it could not issue an injunction against a resumption of such activity.

The trial court found that there were reasonable grounds to believe that without an injunction the Thunderguards would resume their illegal activity. The

Court cited 23 C.J.S. INJUNCTIONS, Section 25:

> "In a proper case, as where there is reasonable ground to believe or there is a liklihood that there will be a resumption of (previously terminated illegal) activity, a court of equitable jurisdiction may issue an injunction since otherwise Defendants would be free to return to their old ways".

The Petitioners cite three cases which they allege disallow such an injunction. All of these cases can be distinquished from the present situation and are not on point.

In Pocketbook Workers v. Orlove 158 Md. 496 the Court held that an injunction to prohibit an action which was merely anticipated and had never been taken was improper.

The Court, in Levinson v. Bonaparte, 131 Md. 635 found that an injunction was improper when there was no evidence to show that the Defendant would take the actions which the injunction was to prohibit.

The Court in Continental Baking Company v. Woodring, 286 US 352, 55 S. Ct. 595, 81 ALR 1402, would not grant an injunction against illegal enforcement of a valid statute since the illegal enforcement was merely

anticipatory. The Court would not grant the injunction since the terms of the statute required it to be enforced in a legal manner and it had never been enforced illegally.

Pocketbook Workers, supra, would not apply since this was not anticipated activity that had never been taken since it was activity which was affirmatively taken in the past.

Levinson, supra, certainly does not apply since the trial court found as a matter of fact that there are reasonable grounds to believe that without an injunction the Petitioners would resume the illegal activity.

Continental Baking, supra, is not applicable since one of the principle purposes of the Petitioner's club was to engage in restricted activity and they had engaged in such activity in the past.

This case does not involve a federal question of such substance that it merits the granting of a writ of certiorari. Supreme Court Rule 17 provides for considerations governing review on certiorari. It provides that review on the writ is not a matter of right and will be granted only for "special and important reasons".

This Court in Rice v. Sioux City Memorial Park Cemetery (1955) 349 US 70, 99 L ED 897, 75 S Ct. 614 applied this rule in upholding the denial of certiorari. For review a state judge must decide a federal question of "substance" not therefore determined or decided in a way not in accord with applicable Supreme Court decisions. The settlement of the issue must be important to the public as distinct from that of the parties or the case presents a real and embarassing conflict of opinion and authority between the Courts of Appeals.

The Petitioners do not claim that this is a federal question of substance which has not been previously determined or the state judge's action is not in accord with Supreme Court decisions. Neither do they claim that there is a conflict of opinion and authority between the Courts of Appeals.

In fact this Euclidean Zoning provision providing for a reasonable restriction in a semi-rural residential area does not constitute a federal question of substance nor has it not therefore been determined and the state judge did not rule in a manner in conflict with the Supreme Court decisions.

There is no conflict of opinion and authority between the Courts of Appeals on this issue.

This case is principly important to the Petitioners, who wish to recontinue the activity which has been prohibited by the zoning ordinance and is not brought to protect a right of the public.

Under Rule 17 the Court should deny the writ of certiorari as not coming within the Rule's guidelines for review.

CONCLUSION

For the foregoing reasons, this Petition for writ of certiorari should be denied.

Respectfully submitted,

Richard R. Cooper
Attorney for Respondents
103 Court Street
Chestertown, Md. 21620
(301) 778-5080

Counsel of Record

February 5, 1982

APPENDIX

KENT COUNTY ZONING ORDINANCE

Article 5.

Section 2. RR, R-1, and R-2, Single Family Residential Districts.

2.1 Purpose of the Districts.
RR Rural Residential District:

The purpose of this district is to provide for the low-density singlefamily residential development, together with such churches, recreational facilities and accessory uses as may be necessary or are normally compatible with residential surroundings, and at the same time, to permit agricultural uses and preserve open sapces and waterfront areas. The district is located to protect existing development of this character and contains vacant land considered appropriate for such development in the future but for which only limited public services are available or planned.

SUPREME COURT RULES

PART V. JURISDICTION OF WRIT OF CERTIORARI

Rule 17. Considerations Governing Review on Certiorari

.1. A review on writ or certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the

decision of another state court of last resort or of a federal court of appeals.

(c) When a state court of federal court of appeals has decided an important questions of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgements of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.